STATE OF MICHIGAN

SUPREME COURT

SUSAN KORRI,

Petitioner-Appellee,

v

NORWAY VULCAN AREA SCHOOLS,

Respondent-Appellant.

UNPUBLISHED
February 10, 2004

No. 238811
State Tenure Commission
LC No. 01-000006

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APPELLANT NORWAY-VULCAN AREA SCHOOLS' APPLICATION FOR LEAVE TO APPEAL

JUDGMENT AND ORDER APPEALED AND RELIEF SOUGHT

On April 26, 2001, the Norway-Vulcan Board of Education ("Board") provided teacher Susan Korri ("Korri") with written notice of its determination that her services as a probationary teacher were unsatisfactory and that her employment would be discontinued effective June 30, 2001. Otherwise, Korri would have completed her two year probationary period and acquired tenure with the Board by operation of law.[1]

On April 27, 2001, Korri filed her Claim of Appeal with the State Tenure Commission ("Commission") contesting her termination. Following a hearing on July 25, 2001, ALJ Tessema Berga issued his Preliminary Decision and Order finding that the Board had followed the requirements of the Michigan Teachers' Tenure Act ("Act") providing Korri with an annual evaluation on January 23, 2001, based on two classroom evaluations held at least sixty days apart.

Thereafter, both the Board and Korri filed exceptions and cross exceptions to the ALJ's Preliminary Decision. On December 19, 2001, the Commission granted one of Korri's exceptions to the ALJ's Preliminary Decision and Order and concluded that the January 23, 2001 evaluation which was issued to Korri was not an "annual year-end performance evaluation" within the meaning of the Section 3a(1) of the Act. The Commission ordered Korri reinstated with full back pay. On February 10, 2004, the Michigan Court of Appeals affirmed the order of the Commission reinstating Korri to her teaching position and ordering back pay.

Appellant Norway-Vulcan Area Schools Board of Education seeks leave to appeal the final Decision and Order of the Michigan Court of Appeals issued on February 10, 2004 (Attachment 1)

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[1]Because Korri had previously acquired tenure with another controlling board, her probationary period was two years. MCL 38.92.

affirming the Decision and Order of the Michigan State Tenure Commission. (Attachment 2). Appellant Board respectfully requests that this Court grant the leave to appeal, and, upon a hearing on the merits, reverse the Decision of the Court of Appeals.

The Michigan State Supreme Court has jurisdiction to review Decisions of the Michigan Court of Appeals pursuant to MCL 600.215(2) and MCR 7.301(2). Also, an aggrieved party may file an application to the Michigan Supreme Court for leave to appeal pursuant to MCL 600.232, 600.309 and MCR 7.302. Therefore, the Michigan Supreme Court has jurisdiction over this appeal.

QUESTIONS PRESENTED FOR REVIEW

A. **DID THE STATE TENURE COMMISSION IMPOSE ADDITIONAL REQUIREMENTS AS TO PROBATIONARY TEACHER YEAR-END PERFORMANCE EVALUATIONS WHICH ARE NOT STATUTORILY AUTHORIZED OR REQUIRED?**

Appellant answers: YES.

The Court of Appeals answered: NO.

Appellee would answer: NO.

B. **DOES THE STATE TENURE COMMISSION'S INTERPRETATION OF THE ANNUAL YEAR-END PERFORMANCE REQUIREMENT INVADE THE DISCRETIONARY PROVINCE OF SCHOOL DISTRICTS AND SCHOOL BOARDS UNDER THE TEACHER TENURE ACT?**

Appellant answers: YES.

The Court of Appeals answered: NO.

Appellee would answer: NO.

C. **DID THE STATE TENURE COMMISSION ERR WHEN IT DETERMINED THAT THE JANUARY 23, 2001 EVALUATION FAILED TO MEET THE TEACHER TENURE ACT'S REQUIREMENTS?**

Appellant answers: YES.

The Court of Appeals answered: NO.

Appellee would answer: NO.

D. **DOES THE STATE TENURE COMMISSION'S DECISION AND ORDER FAIL TO AFFORD REASONABLE NOTICE OF THE STANDARDS APPLICABLE TO THE PERFORMANCE EVALUATION PROCESS FOR PROBATIONARY TEACHERS AND ESCALATE UNCERTAINTY AND COSTS FOR MICHIGAN SCHOOL DISTRICTS?**

Appellant answers: YES.

The Court of Appeals answered: NO.

Appellee would answer: NO.

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STATEMENT OF FACTS

I. OPERATIVE FACTS

Korri was a probationary teacher employed by the Board from July 1, 1999 through June 30, 2001. (T 13)[2] During Korri's first teaching year, 1999-2000, she received an individualized development plan ("IDP") containing three goals and was properly observed and evaluated during that year. Ms. Hommer testified that the procedure which she used for the formulation of IDP goals included a "pre-observation" meeting in which she discussed IDP goals with probationary teachers. (T 15-21, 46-48)

In August, 2000, Korri and her supervisor, Principal Bertha Hommer, had a pre-observation meeting during which the two developed and discussed goals and objectives for Korri's IDP for the upcoming 2000-2001 school year. (T 15) During that meeting, Ms. Hommer handed Korri a partially completed IDP containing the first two goals for Korri's second teaching year. The two also discussed a third goal[3] which required that Korri differentiate instruction according to grade level and find supplementary materials to use for the K-2 grade levels. (T 20) This was the third goal contained in Korri's IDP which was executed in December of 2000. Ms. Hommer explained:

> And during the pre-observation meeting, that's when we sat down and talked about the goals, the possible goals, and that's when Sue Korri had opened up and said that she wasn't as comfortable with the early elementary students as she was with the older students. *And so we had basically decided at that point that we would be looking for different programs to use to help her with the early elementary students' curriculum.* (T 15) (Italics added)

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[2]The designation "T13" refers to the page of the transcript of the hearing before the ALJ.

[3]This goal was mutually developed during that meeting because Korri said to Ms. Hommer that she was not comfortable teaching younger students. This will be referred to as the "curriculum issue." (T 49)

During that meeting, Ms. Hommer stressed to Korri the need for her to address the curriculum issue in her teaching activities. She testified:

> Like I said, at the pre-observation meeting this development plan was - we had talked about possible - especially one goal, differentiating instruction and finding supplementary materials for Ms. Korri to use.

The parties also discussed the need for Korri to obtain materials which would assist her in achieving this goal. *Id.*[4]

Several days later, Ms. Hommer learned of a program known as "EPEC" which had been endorsed by the Michigan Council of Physical Fitness and the Governor's Physical Fitness Program, which she believed would help Korri develop the K-2 grade curriculum. (T 15-16) Shortly thereafter, the two agreed that Ms. Hommer would order the EPEC materials for Korri. *Id.* Korri obtained the EPEC materials later in September. (T 16)

During the following weeks, Ms. Hommer "persistently" asked Korri if she had reviewed the EPEC materials. Each time Korri was asked, she claimed she had no time to review them. (T 23)

Ms. Hommer referred to Korri's progress in meeting this IDP goal in Korri's November 3, 2000 teacher evaluation. Ms. Hommer wrote:

> Sue was also able to find a program that contained physical education activities for students in K-2, which were the grades Ms. Korri was least comfortable with. When extra time was found in her busy schedule Sue plans to review the program activities and beginning implementing them. (Record Exhibit 1)

This evaluation was based upon observations occurring on September 25, October 10 and October 23, 2000. (T 22)

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[4]Ms. Hommer testified that Korri seemed "very enthusiastic" about using this program in her curriculum as both believed that the EPEC materials "would help to address the K through second grade deficiency" that Korri had. (T 16)

In discussions concerning that November 3 evaluation, Ms. Hommer stressed the need for Korri to address the curriculum issue by differentiating instruction based on grade level. (T 25, 29) Also in that evaluation, under "evaluator's specific recommendations for improvement," Ms. Hommer wrote that Korri was to:

> *Review and implement physical education materials for K-2 students from the EPEC program.* (Italics added)

After the November 3 evaluation, Ms. Hommer inquired on several occasions whether Korri had found time to review the EPEC materials and address the curriculum issue; Korri had not. (T 28-29)

When Korri failed to return the completed IDP to Ms. Hommer, Ms. Hommer wrote Korri on December 13, 2000 requesting that they further discuss the IDP goals and formalize the IDP goals about which Ms. Hommer had persistently been asking. (Record Exhibit 3, T 31) Although Korri did not execute the IDP until December 7, 2000, goal 3 reflected the IDP goal which the two had discussed and agreed upon in the August 2000 discussions (*e.g.*, the need for Korri to differentiate physical education according to grade level). (T 20) During the three meetings occurring in December as well as in preceding discussions, Ms. Hommer and Korri discussed the curriculum issue as being one of the objectives that Korri would need to achieve. (T 29, 33)

Ms. Hommer observed Korri three more times on December 8, 2000 and January 10 and 12, 2001. (T 34-36) On January 23, 2001, Ms. Hommer prepared Korri's final evaluation, which was based on all of her observations. (Record Exhibit 6, T 43) In that evaluation, Ms. Hommer identified the curriculum issue as one of her continuing concerns. Ms. Hommer wrote in the last paragraph of page 4 of the evaluation that:

> There's been some strain in the relationship between Ms. Korri and myself. In several instances Ms. Korri has demonstrated a lack of

> appropriate respect for the leadership role of Principal. In addition, negative remarks about other teaching professionals have been disturbing.

Ms. Hommer made these comments as a result of her unsuccessful attempts to address the curriculum issue with Korri. (T 38) Ms. Hommer also commented under the evaluator's narrative that:

> While working with Ms. Korri to improve and enrich the physical education for our elementary students, I recommended that she visit other area physical education teachers. Susan chose not to.
>
> Ms. Korri received the EPEC materials to assist her in developing additional physical education ideas for the early elementary grade levels, K-2. Susan has begun reviewing the EPEC program in an effort to enhance our physical education program. (Record Exhibit 6)

Ms. Hommer also documented Korri's admission that she had just begun reviewing some of the EPEC materials. (T 40) Further, while reviewing the January 23, 2001 evaluation, Ms. Hommer told Korri that her lesson plans did not differentiate curriculum according to grade levels, but merely contained the same plan for all grade levels. (T 58-59) Finally, Ms. Hommer commented on the last page of the evaluation that:

> I feel that it is crucial to maintain an open and professional channel of communication with the staff and expect the staff would listen and act upon suggestions with a positive attitude.

During the hearing before the ALJ, Ms. Hommer testified that she could not maintain her relationship with Korri emphasizing that "it was almost a fight every inch of the way." (T 41) Ms. Hommer concluded that although Korri understood teaching processes and techniques, she demonstrated a lack of respect and failure to maintain a positive relationship with her supervisor. (Record Exhibit 5, T 41)

After the January 23, 2001 evaluation, Ms. Hommer had a conversation with the School District's Superintendent, Mr. Van Gasse, in which she recommended that the School District not retain Korri as a teacher. On April 26, 2001, Superintendent Van Gasse sent Korri a letter informing her that the Board had discontinued her employment due to Korri's unsatisfactory service. (Record Exhibit 9).

II. PROCEDURAL HISTORY

A. STATE TENURE COMMISSION REVIEW

The relevant portion of the ALJ's Preliminary Decision and Order which the Commission found to be erroneous is as follows:

> Appellant's argument that appellee had until the end of April 2001 to complete the evaluation process is without merit. First, appellee is not obligated to wait until April to issue appellant a year-end evaluation. The Act only requires that a school board issue a minimum of an annual evaluation to a probationary teacher every year. While an annual evaluation may be issued at any time following two observations which are 60 days apart, a school board normally does not discharge a probationary teacher, barring special circumstances which warrant immediate discharge, until the end of the school year. This is because normally probationary teacher's contracts expire at the end of the school year and discharging those teachers at the end of the school year would allow them time and opportunity to seek employment for the ensuing year. *Ajluni v West Bloomfield Sch Dist Bd of Educ*, 397 Mich 462; 245 NW2d 49 (1976).
>
> Even assuming that appellee had waited until the end of April to issue a year-end evaluation, nothing would have precluded appellee from finding appellant's performance unsatisfactory irrespective of how well the teacher might have thought she performed. The Supreme Court in *Lipka v Brown City Schs*, 403 Mich 554; 271 NW2d 771 (1978) has held that:
>
> > The tenure commission may not assay a board's reason for concluding [a probationary teacher's

> performance] unsatisfactory. The Act is followed when the notice of unsatisfactory work is timely given whether based on good, bad or unstated reasons. If timely notice of unsatisfactory work is given, no entitlement to tenure arises under the act . . .."
>
> Thus, the Commission's jurisdiction is limited to determining whether the procedural requirements were met. *Gonzalez v Bd of Educ of the Riverview Comm Sch Dist*, (99-10) In the instant case, the school board has followed the procedural requirements. Appellant's claim of appeal is, therefore, denied. (Record Exhibit 2, pp. 8-9)

The Commission reversed, reasoning that: "[t]he ALJ's holding that an 'annual evaluation' may be issued at any time after two observations which are at least 60 days apart fails to give effect to the 'year-end' language of section 3a(1), thus rendering it meaningless." (Decision and Order, pp. 11-12). Characterizing the statutory language as "unclear", the Commission, aided by rules of statutory construction and legislative history, concluded that the January 23, 2001 evaluation "does not comply with the year-end evaluation mandated by Section 3a(1)," stating:

> In this case, however, the January evaluation cannot be reasonably construed as complying with the statutory year-end requirement. On January 23, over three months remained before the May 1 notice deadline, and almost half of the district's school year remained. It is impossible to give effect to the Legislature's deliberate insertion of a "year-end" evaluation requirement and at the same time uphold a mid-year evaluation as satisfying that requirement. We find, therefore, that appellee failed to provide appellant the required year-end performance evaluation. (Decision and Order, p. 13)

The Commission stated its holding as follows:

> We hold, therefore, that the annual year-end performance evaluation should occur within a reasonable time frame of the May 1 unsatisfactory notice deadline to be in compliance with the statute's year-end mandate. *Recognizing that school districts may have multiple probationary teachers to evaluate and limited administrative staff time to produce evaluations, it is to be expected that annual*

> *year-end performance evaluations will have to be compiled a reasonable time in advance of the May 1 deadline.* (Decision and Order, p. 13) (emphasis added).

Notably, the Commission failed to provide guidelines as to "reasonableness." Whether a school district acted reasonably in timing its final yearly probationary teacher performance evaluation is now subject to standardless, *ad hoc* administrative and judicial review.

B. COURT OF APPEALS REVIEW

The Michigan Court of Appeals affirmed the Commission in an unpublished opinion dated February 10, 2004. (Attachment 1). Based upon that Opinion's tone, the court appeared to believe itself constrained by the applicable standard of review to affirm the Commission's Decision.

The Court of Appeals considered only issues of statutory construction in its February 10, 2004 Opinion. Those issues, however, were reviewed under an inappropriate standard. First, the Court announced it was reviewing the matter under the deferential "substantial evidence" standard. (*Id.* at 4). Shortly thereafter, however, the Court acknowledged that statutory construction issues are questions of law which are reviewed *de novo*. (*Id.* at 5). Despite reviewing only the statutory construction issues upon a record whose facts were undisputed, the court concluded that "application of rules of statutory construction *and the standard of appellate review* precludes reversal of this case." (*Id.*) (emphasis added).

In affirming the Commission's Decision, the Court of Appeals relied primarily upon provisions of the Tenure Act having little relation to the issue of when, in this case, the probationary teacher's evaluation was presented. The court reasoned only that:

> [T]he statute at issue imposes mandatory duties upon the controlling board. The board "shall" ensure that a teacher has an individualized plan, and the "year-end" evaluation "shall" be based upon at least two

> classroom observations at least 60 days apart. The use of the term "shall" "denotes mandatory, not discretionary action." *Id.*

That analysis was ultimately rendered a non-sequitur, however, as the parties did not dispute that an appropriate interval existed between observations.

Nevertheless, the Court of Appeals noted that the deferential standard that applied likely led to an illogical result. In footnote 2, the court stated:

> We are mindful that the disposition of this case may be deemed to exult form over substance. In the five months since goals were set for petitioner, respondent concluded that petitioner had taken no action to cure the deficiency with her performance that was allegedly harmful to the earlier elementary students. Arguably, the remedy for a failure to provide a year-end evaluation should merely be the examination of her performance for the remainder of the school year. *Id.* at n 2.

This is an issue of first impression under the Act. The Board asserts that the State of Michigan Court of Appeals' decision affirming the Commission's Decision was improperly deferential and erroneous for the reasons set forth in this Argument.

ARGUMENT

I. THE COURT OF APPEALS ERRONEOUSLY AFFIRMED THE COMMISSION'S UNLAWFUL IMPOSITION OF ADDITIONAL REQUIREMENTS CONCERNING THE ANNUAL YEAR-END EVALUATION.

A. STANDARD OF REVIEW

Although an administrative agency's interpretation of the act it is charged with administering is not binding on the courts, "longstanding, consistent administrative interpretation of a statute by those charged with its execution should be given deference, and ought not be overruled without cogent reasons." *Vanderlaan v Tri-County Comm Hosp*, 209 Mich App 328, 331; 530 NW2d 186 (1995). Such deference, however, is not without exception.

Legal rulings, however, are afforded a lesser degree of deference than other administrative agency findings because such issues ultimately remain subject to review on a *de novo* basis. *St. Clair Intermediate Sch Dist v St. Clair County Educ Assoc*, 245 Mich App 498, 513; 630 NW2d 909 (2001). As, the issue presented by this case does not involve a "longstanding" interpretation of a statute, but instead, involves an issue of first impression, no longstanding administrative statutory interpretation exists to be disturbed. An unqualified *de novo* standard of review should therefore be applied.

B. APPLICATION OF STANDARD

The Commission improperly added additional, unauthorized requirements to the statutory obligation to evaluate probationary teachers' job performance, thereby improperly assuming a legislative function. In *Westervelt v Natural Resources Comm*, 402 Mich 412; 263 NW2d 564 (1978), the Michigan Supreme Court concluded that the constitutional separation of powers requirement precludes the Legislature from delegating legislative powers to an administrative agency, noting:

> The constitutional question of whether the Legislature can delegate its power to an administrative agency, as it developed in our jurisprudence during the nineteenth century and into the twentieth century, was fully discussed for the first time by our Court in *King v Concordia Fire Insurance Co*, 140 Mich 258; 103 NW 616 (1905). See also *Michigan C.R. Co v Michigan Railroad Comm,* 160 Mich 355; 125 NW 549 (1910). In *King*, this Court grounded the "delegation" question in the principle of the separation of powers as expressed in art 4, § 1 of our Constitution of that time which provided that "the legislative power is vested in the Senate and House of Representatives". 140 Mich 258, 267; 103 NW 616, 619. This Court began its analysis of the doctrine by quoting, with approval, from Justice Cooley's Constitutional Limitations, in support of the "well-settled" principle "that such power cannot be delegated":

> One of the settled maxims in constitutional law is that the power conferred upon the Legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the state has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the Constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust." Cooley, Constitutional Limitations (6th ed.), p. 137.

The Michigan Supreme Court set forth the rule for determining whether challenged legislation constitutes a constitutional delegation of power to an administrative agency noting at pp. 439-440 of its opinion:

> First, we believe the constitutional "separation of powers" foundation of the "delegation doctrine" is essentially valid. At a minimum, in order to preserve the constitutional "separation of powers," legislation in which power is delegated to an administrative agency must contain language, expressive of the legislative will, *that defines the area within which an agency is to exercise its power and authority.* Without such language, there would be no "constitutional accountability," i.e., there would not exist an effective measure by which agency compatibility with the legislative will might be ascertained. Or, to phrase this argument in different constitutional language, without such language, there would not exist an effective measure by which the Legislature, the courts, and the public might "check" agency action.
>
> We believe the "standards test," as it has come to be expressed in our jurisprudence, satisfies the constitutional principle of the "separation of powers." If legislation contains, either expressly or by incorporation, standards "reasonably as precise as the subject matter requires or permits," the Legislature, the courts and the public may, if necessary, constitutionally "check" the use of delegated power by an agency. Therefore, we affirm the present expression of the

> "standards test" as a means of preserving the constitutional principle of the "separation of powers." Accordingly, in the face of a challenge to whether legislation constitutes a constitutional delegation of power to an administrative agency, a court is to determine whether the legislation expressly contains or contains by reference "standards * * * as reasonably precise as the subject matter requires or permits."
>
> We also observe, as a matter of analysis, that when "standards * * * as reasonably precise as the subject matter requires or permits" exist, the principle that the Legislature may not delegate or abdicate "law-making" or "legislative" power but only "administrative" power becomes merely a principle of description or convenience, not substance.

The Commission's authority is found under Art VII, Section 7 of the Act, MCL 38.137, which states:

> Tenure commission; powers.
>
> The tenure commission is hereby vested with such powers as are necessary to carry out and enforce the provisions of this act.

In *Lakeshore Bd of Educ v Grindstaff,* 177 Mich App 225, 228; 441 NW2d 777 (1989), *rev'd on other gds,* 436 Mich 339; 461 NW2d 651 (1990), the Michigan Court of Appeals held that under this legislative grant of authority, the Commission may not impose requirements on school boards which are not otherwise expressly authorized by statute, observing:

> While the Tenure Commission has been "vested with such powers as are necessary to carry out and enforce the provisions" of the Act, MCL 38.137; MSA 15.2037, it may not impose a duty upon the school board or order equitable relief that is not expressly authorized by the Act. *Benton Harbor Bd of Educ v Wolff,* 139 Mich App 148, 156; 361 NW2d 750 (1984), *lv den* 422 Mich 976 (1985); *Farmer v Holton Pub Schs*, 138 Mich App 99; 359 NW2d 532 (1981). This is consistent with the generally accepted principle that an administrative reviewing panel has only that power and authority granted to it by statute. 2 AmJur2d, Administrative Law, § 546, p. 355. See also, *Michigan Humane Society v Natural Resources Comm,* 158 Mich App 393, 399-400; 404 NW2d 757 (1987); *Pharris v Secretary of State,* 117 Mich App 202, 204; 323 NW2d 652 (1982).

The Commission's limited authority precludes it from expanding existing statutory requirements concerning probationary teacher evaluations. MCL 38.83a(1) clearly states that "[e]xcept as *specifically* stated in this subsection, *this section does not require a particular method for conducting a performance evaluation* . . .." (italics added) Moreover, as the ALJ observed, the Act does not mandate that the annual year-end performance evaluation be issued at any specific time.

Although the Legislature expressly stated that no particular method for conducting a performance evaluation is required, and has not established a particular time by which the evaluation must be issued, the Commission's Decision imposes such requirements. As discussed on pages 14 and 15 of its Decision and Order, the Commission mandates that a teacher's ". . . annual year-end performance evaluation *must be prepared* within a reasonable time coordinating with the May 1 deadline for issuing a notice of unsatisfactory service." The Act, however, does *not* require that the annual year-end performance evaluation be *prepared*; it merely requires that it be *provided* to the teacher.[5]

The Commission has also established time frames in which the annual year-end performance evaluation *must* be prepared stating that the annual year-end performance evaluation must be *prepared* within a "reasonable time" of the May 1 deadline. The Act, however, imposes no such requirement and leaves this determination to a board of education's administration.[6]

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[5]Although the Commission did not require that the prepared annual year-end performance evaluation be in writing, it is inevitable that the Commission will eventually be presented with this argument. Korri argued, for instance, that her IDP must be written even though no provision of the Act requires this.

[6]The May 1 "deadline" results from the requirement in Article II, Section 3 of the Act, MCL 38.83, that a controlling board provide the probationary teacher a definite written statement as to whether or not his work has been satisfactory at least 60 days before the close of the school

Other aspects of the Commission's Decision suffer from the same deficiency and further obfuscate the inquiry. On p. 13 of its Decision and Order, the Commission stated:

> Recognizing that school districts may have multiple probationary teachers to evaluate and limited administrative staff time to produce evaluations, it is to be *expected* that annual year-end performance evaluations will have to be *completed* a reasonable time in *advance* of the May 1 deadline. (italics added)

Although this statement is similar to the Commission's earlier statement, there are subtle differences. In the Commission's first statement discussed above, the teacher's annual year-end evaluation "must" be "prepared" within a "reasonable time" of the May 1 deadline.[7] Under this second enunciated standard, the mandatory requirement is gone: that is, it is "expected" that the teacher's annual year-end evaluation be "completed" a reasonable time in "advance" of the May 1 deadline.

The Commission also appears to have established yet a third standard applicable to when the annual year-end performance evaluation "should occur" noting at page 13:

> We hold, therefore, that the annual year-end performance evaluation *should occur within* a reasonable time frame of the May 1 unsatisfactory notice deadline to be in compliance with the statute's year-end mandate. (italics added)

Section 3a of Article II currently reads as follows:

> Sec. 3a. (1) If a probationary teacher is employed by a school district for at least 1 full school year, the controlling board of the probationary teacher's employing school district shall ensure that the teacher is provided with an individualized development plan developed by appropriate administrative personnel in consultation with the individual teacher and that the teacher is provided with at least an annual year-end performance evaluation each year during the

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year.

[7]Under current law, a school administrator is not prevented from preparing the evaluation anytime after the second observation, now that time period has been restricted by the Commission.

> teacher's probationary period. The annual year-end performance evaluation shall be based on, but is not limited to, at least 2 classroom observations held at least 60 days apart, unless a shorter interval between the 2 classroom observations is mutually agreed upon by the teacher and the administration, and shall include at least an assessment of the teacher's progress in meeting the goals of his or her individualized development plan.

Incorporation of the Commission's Decision into the statutory language effectively amends the statute to now read as follows:

> Sec. 3a. (1) If a probationary teacher is employed by a school district for at least 1 full school year, the controlling board of the probationary teacher's employing school district shall ensure that the teacher is provided with an individualized development plan developed by appropriate administrative personnel in consultation with the individual teacher and that the teacher is provided with at least an annual year-end performance evaluation each year during the teacher's probationary period. The annual year-end performance evaluation shall be based on, but is not limited to, at least 2 classroom observations held at least 60 days apart, unless a shorter interval between the 2 classroom observations is mutually agreed upon by the teacher and the administration, and shall include at least an assessment of the teacher's progress in meeting the goals of his or her individualized development plan. ***THE ANNUAL YEAR-END EVALUATION: 1) MUST BE PREPARED WITHIN A REASONABLE TIME COORDINATING WITH THE MAY FIRST DEADLINE FOR ISSUING A NOTICE OF UNSATISFACTORY SERVICE CONTAINED IN ARTICLE II, SECTION 3 AND 2) SHOULD OCCUR WITHIN A REASONABLE TIME OF THE MAY FIRST UNSATISFACTORY SERVICE DEADLINE. IF A SCHOOL DISTRICT HAS MULTIPLE PROBATIONARY TEACHERS TO EVALUATE AND LIMITED ADMINISTRATIVE STAFF TO PRODUCE EVALUATIONS, THE STATE TENURE COMMISSION EXPECTS THAT ANNUAL YEAR-END PERFORMANCE EVALUATIONS BE COMPLETED IN ADVANCE OF THE MAY FIRST DEADLINE, BUT NO MORE SO THAN IS REASONABLE.*** (emphasis added) (Hypothetical amended language in bold capital letters).

Article II of the Act imposes only two requirements on school districts and their boards of education relevant to this inquiry. Section 3 of Article II requires that a "controlling board shall provide the probationary teacher with a definite written statement as to whether or not his work has been satisfactory" at least 60 days before the close of the school year.[8]

Section 3a(1) of Article II does not state when the annual year-end performance must be provided. MCL 38.83a. It requires only that "the annual year-end performance evaluation shall be based on, but is not limited to, *at least 2 classroom observations held at least 60 days apart*, unless a shorter interval between the 2 classroom observations is mutually agreed upon by the teacher and the administration, and *shall include at least an assessment of the teacher's progress in meeting the goals of his or her individualized development plan.*"[9]

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[8]That section provides:

> 38.83. Notice to teacher, written statement
>
> Sec. 3. At least 60 days before the close of each school year the controlling board shall provide the probationary teacher with a definite written statement as to whether or not his work has been satisfactory. Failure to submit a written statement shall be considered as conclusive evidence that the teacher's work is satisfactory. Any probationary teacher or teacher not on continuing contract shall be employed for the ensuing year unless notified in writing at least 60 days before the close of the school year that his services will be discontinued.

[9]That provision states that:

> * * *The annual year-end performance evaluation shall be based on, but is not limited to, *at least 2 classroom observations held at least 60 days apart*, unless a shorter interval between the 2 classroom observations is mutually agreed upon by the teacher and the administration, and *shall include at least an assessment of the teacher's progress in meeting the goals of his or her individualized development plan.* This subsection does not prevent a collective

Had the Legislature intended to specifically identify the time when the annual year-end evaluation must be prepared, completed and issued to the teacher, it could easily have done so. By failing to establish a specific time frame in which an annual year-end evaluation must be issued to a probationary teacher, the Legislature left that determination to a school board's administrative staff - not to the Commission or a court. The Act's failure to specifically designate a specific time or month in which this final year-end evaluation must be provided indicates that the Legislature intended to allow school officials the flexibility to deal with the practical realities of the probationary teacher evaluation process. Moreover, the Legislature did not intend that the probationary teacher have the right to an administrative hearing to contest the reasonableness of the time frame in which the annual year-end performance evaluation was provided to the teacher.

As noted by the ALJ, the Act requires that school districts issue only one annual year-end evaluation which is based upon at least two classroom observations held at least 60 days apart and includes an assessment of the teacher's progress in meeting IDP goals. Theoretically, a school district could conduct an observation of the probationary teacher in September and one in December to satisfy the classroom observation requirement. Because the Legislature requires only that the annual evaluation be based upon these observations, there exists no legitimate reason why a school district official who performs the evaluation must wait several months following the last observation

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> bargaining agreement between the controlling board and the teacher's bargaining representative under Act No. 336 of the Public Acts of 1947, being sections 423.201 to 423.216 of the Michigan Compiled Laws, from providing for more performance evaluations or classroom observations in addition to those required under this subsection. Except as specifically stated in this subsection, *this section does not require a particular method for conducting a performance evaluation or classroom observation or for providing an individualized development plan.* (italics added)

to give the probationary teacher the evaluation.[10] This aspect of the Commission's Decision effectively exalts form over substance.

The Commission's imposition of additional requirements regarding issuance of the annual year-end evaluation which are not authorized by the Act is therefore contrary to law and reason. *Lakeshore Bd of Educ v Grindstaff,* 177 Mich App 225, 228; 441 NW2d 777 (1989), *rev'd on other gds,* 436 Mich 339; 461 NW2d 651 (1990). Significantly, imposition of this timing requirement could preclude school districts from forming conclusions about a probationary teacher's performance and acting upon such conclusions before the close of the school year. Such constraints provide probationary teachers with job security never intended by the Legislature.

The Court of Appeals should have reviewed this issue on a *de novo* basis, as it involves only the application of undisputed facts to a statute. Moreover, since this is an issue of first impression, little if any judicial deference to the Commission's analysis was required. By providing undue deference to the Commission, the Court of Appeals admittedly may have exulted "form over substance." (Attachment 1, n 2). Moreover, the substantial deference school districts have been legislatively provided in evaluating and terminating probationary teachers has been unduly restricted. This Court should therefore grant leave to appeal, and reverse the Court of Appeals.

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[10]As discussed earlier, the Commission's requirement that the annual year-end performance evaluation be "prepared" within a reasonable time coordinating with the May 1 deadline as opposed to being "provided" (as required by the Act) arguably prevents a school official from *preparing* the evaluation shortly after conducting the last observation if the time of preparation does not meet Commission requirements.

II. THE COURT OF APPEALS ERRONEOUSLY AFFIRMED THE COMMISSION'S INTERPRETATION OF THE ANNUAL YEAR-END PERFORMANCE REQUIREMENT BECAUSE THIS INTERPRETATION INVADES THE DISCRETIONARY PROVINCE OF SCHOOL DISTRICTS AND SCHOOL BOARDS UNDER THE ACT.

A. STANDARD OF REVIEW

The Board incorporates by reference the standard of review set forth in Section I(A) of the Argument.

B. APPLICATION OF STANDARD

Several Michigan Court decisions have addressed the purpose of the probationary period set forth under Article II of the Act. In the seminal case of *Lipka v Brown City Schs*, *supra*, the Michigan Supreme Court stressed at pp. 558-559 of its Opinion that a teacher's probationary period is ". . . a trial period during which a controlling board may make a *subjective* determination of whether a certain teacher satisfies that district's particular needs and policy." This conclusion was warranted, the Court observed, because the Act contains no requirement that hearings occur either at the school board level or the before the Commission concerning a board's decision that a probationary teacher's service was unsatisfactory. For this reason, the court concluded that "[w]e should not require that such a procedure meet an objective standard applicable to all school districts." (*Id.* at 559). Because a school board can lawfully make a subjective decision that a probationary teacher's services are not satisfactory, the Court concluded that a school board is not required to state the reasons for finding a teacher's performance unsatisfactory and that "the tenure commission may not assay a board's reason for concluding the work unsatisfactory." *Id.*

The holding in *Lipka*, *supra*, has been previously cited as controlling authority by the Commission. See: *Cummings v Bd of Educ of Centerline Pub Schs*, (98-18). Thus, until now, it has

been settled law that a school board retains the unfettered discretion to determine whether a probationary teacher's service is satisfactory, and neither the Commission nor a court can review the school board's decision.

The Commission's Decision requires that ". . . an annual year-end performance evaluation must be prepared within a *reasonable time coordinating with the May 1 deadline* for issuing a notice of unsatisfactory service." Decision and Order, pp. 14-15. Although the Commission did not provide any guidance to assist school districts in determining what constitutes a "reasonable time," the Michigan courts have addressed this issue in different contexts concluding that this determination depends on the particular facts and circumstances of each case. Thus, in *Johnson v Landa*, 10 Mich App 152; 159 NW2d 165 (1968), the Court of Appeals observed that when the time for performance was not specified in a contract, then the time for performance would be a *reasonable time*:

> In deciding the issue of reasonable time the court must consider *all of the relevant circumstances*, See *Reinforced Concrete Pipe Co v Boyes*, 180 Mich 609; 147 NW 577 (1914), and consequently, appellant should have been permitted to introduce this evidence. (italics added)

See also: *Stoddard v Mfg's Natl Bank,* 234 Mich App 140; 593 NW2d 630 (1999) [jury instructions in dispute concerning stock sale held in joint account required consideration of all the circumstances surrounding the case]; *Soloman v Western Hills Dev Corp*, 88 Mich App 254; 276 NW2d 577 (1979) [where time of performance is indefinite, performance may be required to be rendered within a reasonable time; what constitutes a "reasonable time" depends on facts and circumstances].

Application of this well established legal precedent to the "reasonable time" standard enunciated by the Commission, requires consideration of the particular facts and circumstances supporting the timing of the School District's decision to issue the annual year-end evaluation when

it did. In order to do this, the Commission *must* inquire into all of the relevant circumstances (*e.g.*, the reasons) why the administration issued the annual year-end performance evaluation so that it can determine whether the evaluation was "prepared" and "provided" within a reasonable time of (or in advance of) the May 1 deadline.

This is exactly what the Michigan Supreme Court has cautioned in *Lipka v Brown City Schs, supra*, that the Commission or a court must not do because that prerogative has been reserved solely to school boards.[11] Invasion of this discretionary right by the Commission and Court of Appeals combined with the utter lack of enunciated standards concerning "reasonableness" of timing, has placed school districts subject to a judicially reviewable objective test which is utterly standardless. As all decisions concerning probationary teachers which are based upon the year-end evaluation are now potentially subject to statutorily unauthorized, *ad hoc* legal review, this Court should grant leave to appeal.

The Court of Appeals treated the Commission's analysis of this issue of law with undue deference. In so doing, the procedural simplicity and consequent broad discretion which local school districts are legally entitled to exercise in employing probationary teachers has been significantly undermined. Leave to appeal should therefore be granted.

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[11]In this case, for example, the administration issued Korri's evaluation in January because it was apparent that Korri simply would not implement the EPEC materials or address the curriculum issue. Thus, this deficiency in Korri's performance caused both the issuance of the January evaluation and the Board's finding that Korri's service was unsatisfactory.

III. THE COURT OF APPEALS ERRONEOUSLY AFFIRMED THE COMMISSION'S DETERMINATION THAT THE JANUARY 23, 2001 EVALUATION WAS UNREASONABLY TIMED.

A. STANDARD OF REVIEW

The Court of Appeals was invited to, but did not, consider the "reasonableness" of the Board's timing of Korri's evaluation under the Commission's new "reasonableness" standard. Had it done so, it would have analyzed that issue under the "substantial evidence" standard of review.

With respect to STC appeals, the reviewing court's function "is to determine whether the record contains competent, material, and substantial evidence to support the Commission's findings." *Widdoes v Detroit Public Schools*, 242 Mich App 403, 408; 619 NW 2d 12 (2000), *lv den* 463 Mich 998 (2001). "Substantial evidence is that which a reasonable mind would accept as adequate to support a decision; it is more than a scintilla but may be substantially less than a preponderance." *Id.* at 408-409, *quoting Parker v Byron Center Public Schls Bd of Educ*, 229 Mich App 565, 578; 582 NW2d 859 (1998). That standard is derived from Const 1963, art 6, § 28, and is further codified in Section 106 in the Administrative Procedures Act, MCL 24.306(d).

B. APPLICATION OF STANDARD

The Commission's Decision and Order characterizes the January 23, 2001 evaluation as a "mid-year" evaluation which does not satisfy the annual year-end requirement contained in Section 3a(1) of the Act. MCL 38.83a(1). However, the reasonableness of the administration's decision to issue Korri's year-end evaluation on January 23, requires consideration of the specific facts

supporting that decision - not just an assessment of the number of months that have passed since the beginning of the school year.[12]

Moreover, the Commission's failure to discuss the specific facts underlying the administration's decision to issue the January 23 evaluation when it did indicates that it did not consider whether the that evaluation was issued within a reasonable time of the May 1 deadline. Had the Commission conducted the fact-specific inquiry necessary to determine the reasonableness of the administration's action, it would have learned the following.

By January 23, 2001, Korri had been given five months during the 2000-2001 school year to demonstrate her ability to perform in the position. As of that date, however, Korri had demonstrated to Ms. Hommer, that she could not (or would not) comply with the requirement contained in goal three of her IDP that she address the curriculum issue. As of that date, Korri had not used any of the lesson plans from the EPEC despite having received those materials in mid to late September, 2000.

The record is also uncontradicted that Korri and Ms. Hommer, met in August, 2000, to discuss Korri's second year goals for her IDP. (T 14-21) Ms. Hommer and Korri specifically discussed the curriculum issue *which was identified at that time as an IDP goal.* After that August

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[12]For example, a probationary teacher may find it necessary to take an extended leave of absence from teaching. This may occur, for example, for medical reasons or illness or death in the teacher's family. Under those circumstances, it would be reasonable for a district to issue the annual year-end evaluation at the time the teacher actually took the leave. If a probationary teacher took a medical leave in January and utilized sick leave under district policies to cover the absence up through May, the teacher could acquire tenure if the annual year-end performance evaluation was not issued in January. The Commission has held that a teacher's use of 63 consecutive sick days did not *interrupt* the probationary service. *Gladstone v Highland Park Bd of Educ*, (80-14). This prospect clearly mitigates against the Commission's apparent blanket finding that a January performance evaluation can never meet the requirements of the Act.

discussion, this goal and whether Korri had incorporated the EPEC materials into the curriculum was the subject of "persistent" inquiry from Ms. Hommer. The record shows Ms. Hommer emphasized the need for Korri to address this goal and use the EPEC materials after each of Ms. Hommer's six observations of Korri, in the November 3, 2000 evaluation (and the discussion of that evaluation), in three memoranda issued to Korri, in the meeting occurring in December, 2000 in connection with those memoranda, and finally, in Korri's January 23, 2001 evaluation and the related discussion of that evaluation. As of January 23, 2001, Korri had been given *five months* (*e.g.*, September, October, November, December and January) to address the curriculum issue first identified in August as an IDP goal and, as of that date, she had only *begun* reviewing the EPEC materials that she received in mid to late September of 2000. Moreover, Korri had not followed Ms. Hommer's recommendation that she visit another teacher's classroom to assist in addressing the curriculum issue.[13]

The requirement that Korri differentiate curriculum based on grade level was not an onerous requirement and was one that she could and should have implemented, if not in August, certainly in September after she received the EPEC materials. Those materials set forth a recommended curriculum (including lesson plans) which would have been immediately available to Korri had she expended the slightest effort to review the materials.[14] (T 51) If Korri had any doubt about the need for her to meet the objective that she address the curriculum issue, that doubt was eliminated when

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[13]Korri told Ms. Hommer that she did not want to adopt another teacher's bad habits. (T 28)

[14]Korri also told Ms. Hommer that she felt the preparation of lesson plans was just the "lazy way for teachers." (T 28-29)

the goal was referenced in her November 3 evaluation and discussed with her at that time.[15] Still later, in December, despite Ms. Hommer's urgings, Korri still had not found time to incorporate the EPEC materials into the curriculum nor would she visit other teachers' classrooms to obtain ideas of the curriculum.

When Ms. Hommer insisted that Korri address these issues, she refused to do so. Ms. Hommer testified:

> I asked if she [Korri] waned to go to another classroom to visit to see what they're doing, and she just didn't want to do it. And after the discussion - and there were several things - I just remember at the very end of the discussion - because again, we talked about the lesson plans and about the value of other - visiting other classrooms and suing teachers as resource people. And I basically at the very end told her that you need to start using those materials and change the lesson plans, and she left with the comment, "*I think you need to look for - I think you need a new teacher*," was the end comment she made to me. (T 32) (italics added)

The record is clear that as of January 23, 2001 *Korri had failed to implement IDP goals and address the curriculum issue.* This was well past the halfway point in the school year.

During this five month period, the lower elementary students had to endure the effects of a curriculum which was not appropriate for their age level - a situation which Ms. Hommer, Superintendent Van Gasse and the Board deemed unacceptable. Korri's failure to address the

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[15]Ms. Hommer also had her doubts about Korri's willingness to implement a more appropriate curriculum for lower elementary students as early as the time of the November 3, evaluation. Ms. Hommer explained her concerns in this way:

> Because I wanted what was best for my students, and if Ms. Korri expressed concern about that back in August and here it is November and she still hadn't found time to look at these programs I was starting to wonder when or if they ever would be implemented and used. (T 24)

curriculum issue had a demonstrable negative impact on school activities resulting in complaints by younger students that activities were "too rough" (T 27, 28 - 39) and comments by parents that the students did not enjoy the activities. (T 27-28, 39)

During the many times that Ms. Hommer spoke to Korri about the need for her to differentiate curriculum according to grade level, Ms. Hommer was met with resistance and, occasionally, hostility.[16]

Because Korri had not addressed the curriculum issue as of January 23, Ms. Hommer concluded that Korri's performance, as of that date was unsatisfactory and, on the "Friday prior to March 12" (T 66) (*i.e.*, March 9, 2001) informed the School District's Superintendent, Mr. Van Gasse that she didn't feel that Korri was putting forth the effort and that she should not be kept on. (T 42) Superintendent Van Gasse testified that he had requested that all administrators have recommendations by March 12, 2001 concerning whether probationary teachers would receive tenure. (T 66) Thus, on March 13, 2001, the Board acted upon the administration's recommendation to not grant Korri tenure. (Record Exhibit 7)

Although it is true that Ms. Hommer could have issued a third evaluation, that would have been a *futile* effort since it was apparent to her that as of January 23, 2001, Korri simply had not demonstrated satisfactory performance and no reasonable likelihood existed that she would do so. Given the efforts that Ms. Hommer had previously made to assist Korri in meeting the objectives of her IDP, the Board's actions must be seen as reasonable under the circumstances. Thus, the Commission had no legitimate reason to second guess the Board's decision.

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[16]The record shows that Korri referred to the lower elementary students as being "just lazy, they just don't want to run, that's why they don't want to come to class." (T 28).

The Commission's Decision thus focused entirely upon how closely the evaluation was timed in relation to the May 1 "drop dead" date, and not upon whether: (1) the other statutory requisites of the Act had been met; and (2) whether the decision was educationally reasonable. Based upon the whole record, it cannot be reasonably concluded that the Board acted arbitrarily and capriciously with respect to Korri's employment, regardless of whether the Commission's newly-arrived "reasonableness" standard is applied. Due to the significance of the legal and factual issues underlying the undisputed record facts, the Court of Appeals erred by failing to undertake review of the significant issue. Leave to appeal should therefore be granted.

IV. LEAVE TO APPEAL SHOULD BE GRANTED, BECAUSE THE COURT OF APPEALS INCORRECTLY AFFIRMED THE COMMISSION'S DECISION ABROGATING A SCHOOL DISTRICT'S DISCRETION TO PROVIDE A FINAL EVALUATION BEFORE NOTICE OF UNSATISFACTORY PERFORMANCE MUST BE PROVIDED.

A. STANDARD OF REVIEW

The Board incorporates by reference the standard of review set forth in Section I(A) of the Argument.

B. APPLICATION OF STANDARD

The Commission correctly observes that it cannot give literal meaning to the term "year-end performance evaluation" since the Act's requirement that the Board give Korri the 60 day notice of unsatisfactory service would effectively render meaningless any evaluation provided after April 30. MCL 38.83. In other words, the term "year-end performance evaluation" cannot be read to require that the teacher's evaluation be provided at the *end* of the school year. Otherwise, a school district could *never* provide the 60 day notice required by Section 3 of the Act. *Id.*

The Commission ignores the fact that the Act contemplates that notice of unsatisfactory service may properly be provided *before* the commencement of the 60 day period by mandating that notice be given "*at least* 60 days before the close of each school year." MCL 38.83. This provision allows a school board to provide a teacher with written notice of unsatisfactory service well before the May 1 deadline which would also require that the annual year-end evaluation be provided earlier. Thus, the Act does not, as the Commission concludes, establish May 1 as the earliest date by which notice of unsatisfactory service must be provided.

It is also true that the Michigan Supreme Court in *Lipka v Brown City Schs, supra*, held that the purpose of the 60 day notice requirement contained in Article II, Section 3 of the Act is to afford the teacher *sufficient time to obtain other employment*. In view of the Michigan Supreme Court's interpretation of Legislative intent underlying this provision, the administration's decision to provide Korri with the annual year-end evaluation on January 23, 2001, furthered the purposes of the Act. As previously discussed, Section 3 of Article II does not require that the teacher receive notice of unsatisfactory service on May 1; instead, it establishes that date as the last permissible date by which the notice of unsatisfactory service must be provided making the provision of earlier notice discretionary with the board.

Since the statutory language cannot be literally construed, it is subject to a reasonable interpretation. The Board submits that the ALJ's conclusion that "appellee is not obligated to wait until April to issue appellant a year-end evaluation" properly interprets the Act, reflecting the realities associated with the probationary teacher evaluation process. Thus, the ALJ's conclusion that Board's issuance of the January 23, 2001 evaluation met the requirements of the Act was not erroneous and the Commission erred when it reversed that determination.

V. THE COURT OF APPEALS AFFIRMANCE OF THE COMMISSION'S DECISION IS ERRONEOUS BECAUSE IT FAILS TO AFFORD REASONABLE NOTICE OF THE STANDARDS APPLICABLE TO THE PERFORMANCE EVALUATION PROCESS FOR PROBATIONARY TEACHERS AND WILL ESCALATE UNCERTAINTY AND COSTS FOR MICHIGAN SCHOOL DISTRICTS.

A. STANDARD OF REVIEW

The Board incorporates by reference the review standard set forth in Section I(A) of the Argument.

B. APPLICATION OF STANDARD

Under the Commission's decision, a school board is now obligated to prove that it prepared and provided a probationary teacher with an annual year-end performance evaluation within a "reasonable time" of the May 1 deadline, even though the Act does not preclude a school district from providing notice of unsatisfactory service prior to May 1 (*e.g.*, April 15). The Commission's imposition of this new standard effectively eliminates the board's ability to make subjective decisions concerning the performance of an unsatisfactory probationary teacher because the reasonableness of the time in which the annual year-end performance evaluation is issued is now subject to challenge. Since the time period in which the evaluation is issued is usually inextricably intertwined with the reasons for the determination (as was the case here) substantive aspects of the determination now become the subject of Commission inquiry.

The inevitable result of this Decision will be to significantly escalate the uncertainty and costs for Michigan school districts. Since the Commission has now opined that the annual year-end performance evaluation must be prepared and provided within a "reasonable time" of the May 1 deadline created by the Act, a probationary teacher now has the ability to force a school district to litigate this issue before the Commission. Since this determination requires an assessment of the

specific facts of each particular case, the Commission's decision effectively affords probationary teachers an additional right that had not previously existed; the right to inquire into the reasons underlying the notice of unsatisfactory service.

Because the Commission has provided no definitive guidelines concerning what this reasonable time is prior to the May 1 deadline, any school district which chooses to issue an annual year-end performance evaluations sooner than the last possible moment must risk not only the inconvenience of litigation, but the prospect of an unfavorable decision.[17] That risk, as illustrated by this case, is all too real; the district is required to employ the services of an unsatisfactory tenured teacher and assume all back pay liability. Under those circumstances, the only way that a school district will be able to escape the prospect of litigating probationary teacher non-renewals is to pay the teacher to resign. Neither the Legislature nor the courts intended this result.

Finally, it is fundamentally unfair for the Commission to establish such a vague and unworkable standard and give that standard retroactive effect. In other contexts, the Michigan courts have held that the retroactive application of a decision may be withheld where it would have an unduly harsh effect on a party, *Moorhouse v Ambassador Ins Co*, 147 Mich App 412; 383 NW2d 219 (1985).

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[17]The Michigan Supreme Court in *Ajluni v West Bloomfield Sch Dist Bd of Educ*, 397 Mich 462, 465; 245 NW2d 49 (1976), held that the close of the school year is June 30. In reaching this conclusion, the Court observed that not only was such a conclusion "reasonable and supported by common sense" but that it also "has the salutary affect of providing certainty to all parties every year of the date by which notice must be given." Given a school district's inability to determine with any reasonable assurance what the Commission may ultimately find to be a "reasonable time of the May 1 deadline" the Commission's Decision provides great uncertainty in this respect.

RELIEF

The Board respectfully requests that this Court grant leave to appeal and:

1. Reverse the decision of the State of Michigan Court of Appeals; and

2. Conclude that the January 23, 2001 teacher tenure evaluation met the Teacher Tenure Act's requirements and the Commission's Decision was unlawful.

Respectfully submitted,

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